Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues		

ADDITIONAL SUPPLEMENT TO PETITION FOR EMERGENCY RECONSIDERATION AND REQUEST FOR MODIFICATION OF RULES OF YANKEE MICROWAVE, INC.

On May 3, 1993, Yankee Microwave, Inc. ("Yankee"), by its attorneys, filed a "Petition For Emergency Reconsideration And Request For Modification Of Rules" (hereinafter "Petition For Reconsideration") in the above-referenced proceeding, specifically dealing with the "superstation exemption." That Petition was supplemented on May 6, 1993, June 14, 1993, and June 18, 1993. Since Yankee's last supplement, additional facts have come to light which bear consideration in connection with Yankee's Petition For Reconsideration. A Petition for Reconsideration of Yankee's Stay Request is also currently pending before the Commission.

I. With The Effects of The New Rule Already Impacting Yankee, A Decision on This Petition is Needed Now.

In its Petition for Reconsideration, Yankee challenged the so-called "superstation exemption" contained within the Commission's retransmission consent Rules, which exempts from retransmission consent superstation signals obtained from a satellite carrier, but not from other distributors such as

microwave carriers -like Yankee, or cable TV-owned CARS systems.[1]

Yankee argued that an unintended impact of the Rule would be to unfairly discriminate in favor of satellite carriers over microwave or other signal delivery means and entities. Through its Petition and supplements, Yankee has provided just-developed evidence in the form of letters from its customers, demonstrating that if the rule is put into effect on October 6, 1993 as currently written, 12 of the 14 cable systems which presently receive superstations via microwave from Yankee, intend to change the method of such stations' delivery in order to avoid the necessity of seeking -- & Possibly being denied -- retransmission consent. Yankee has argued that the loss of these customers will jeopardize its very existence.

Over the 3 months since it filed its petition, Yankee has repeatedly urged the Commission to respond quickly to its petition because business realities dictate that decisions concerning such changes will likely be made well in advance of the Rule's October 6, 1993 effective date.[2] However, despite Yankee's provision of clear evidence showing the immediacy of the imminent and substantial harm it is facing, as a result of the

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[1] See 47 C.F.R. § 76.64(b)(2).

[2] Decisions by such cable systems must be made far enough in advance to allow adequate contractual termination notice to Yankee, and time for the purchase of alternative reception equipment.

arbitrary and discriminatory superstation definition, the Commission to date has not acted on its Petition.

This past week, as predicted, Yankee received a letter of termination from one of its customers -- State Cable TV. (attached hereto as Exhibit 1).[3] This termination, effective October 1, 1993, will reduce by 71% the broadcast signals provided by Yankee, via microwave, to State Cable's six systems.[4] In its letter, State Cable specifically cites the new regulation as the reason for its decision. Similarly, this past week, another of Yankee's customers orally communicated that it can hold off making its final decision on whether to drop its Yankee superstation feeds in favor of satellite delivery only until August 7th. This is in part because the Commission has accelerated from October 1st to September 1st its rate regulation implementation. This change has apparently accelerated the decisionmaking processes of certain of Yankee's clients with regard to this related matter. Therefore, a decision on Yankee's Petition must be made **now**, before Yankee has lost the last few of its customers.

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[3] Also attached hereto, as Exhibit 2, is a letter, dated July 26, 1993, from Bernard Karlen, President of Yankee Microwave, to Senator George Mitchell, detailing, in his own words, the severity of Yankee's present situation.

[4] Yankee currently provides three signals to two of State Cable's systems, and two signals to four of its other systems. After October 1, 1993, Yankee will lose two of the systems completely, and will be providing only one signal to the other four.

II. The Commission Has The Latitude to Modify Its Definition Of a "Superstation" to Provide The Relief Sought by Yankee.

In its Report and Order on signal carriage issues, released March 29 1993, the Commission stated that its initial interpretation of the "superstation exemption" was "supported by the plain language of the statute."[5] However, it is clear that the language which the Commission now seeks to reflexively apply, not only is subject to different interpretation, but if applied as the Commission has interpreted it, will produce results contrary to the will of Congress and the very purpose of the Act. Yankee maintains that in the past where the intention of Congress is either ambiguous, or clearly unintended, the Commission will attempt to comply with congressional directives in the manner which best serves the spirit of the Act.

and quite naturally, seek to pass on to their subscribers the added costs which they will incur from this more expensive satellite delivery and retransmission method. Thus it is apparent that the superstation definition will produce the anomalous result of increasing customer costs despite the fact that the very purpose of the Cable Television Consumer Protection and Competition Act of 1992 is to promote competition and prevent otherwise unnecessary rate increases.

Clearly, the effect that this language will have was not intended by Congress. There is no indication from the legislative history of an intention to differentiate between distant signals delivered via satellite versus other means. In fact, Congress' intention in adopting the "superstation exemption" was to avoid disrupting established carriage relationships of superstation signals,[6] while excluding from retransmission requirements all signals which were superstations as of May 1, 1991.[7] The legislative history of the Act is replete with references to the necessity to promote competition in the video marketplace, protect consumers against monopoly

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[6] See Senate Report No. 102-92, 102d Cong., 1st Sess. at 37 (June 28, 1991)(hereinafter "Senate Report"). The Senate version of the Act exempted "users of broadcast signals that were transmitted by satellite carrier or common carrier on May 1, 1991." The intent was to exclude from retransmission rights "stations which now operate as 'superstations' or whose signals are delivered to home satellite dishes..." Id.

[7] Id.

rates, and prevent anti-competitive practices.[8] It would be a perversion of the Act's purpose to interpret its provisions in such a way as to punish microwave providers, force cable systems to abandon microwave in favor of satellite delivery, eliminate

of that legislation was to " create an interim statutory license in the Copyright Act for satellite carriers to retransmit television broadcast signals of superstations and network stations to earth station owners for private home viewing." House Report No. 100-887(I), 1988 U.S. Code Cong. and Adm. News, 5577, 5611, House Report No. 100-887(II), 1988 U.S. Code Cong. and Adm. News, 5577, 5638. While cable operators had long been able to take advantage of the compulsory copyright language contained in Section 111 of the Copyright Act with regard to their passive retransmission of all distant signals, it was determined that a special provision was necessary because the activities of satellite carriers fell outside such provision. In defining the activities of such satellite carriers, Congress first established the above-referenced definition of a superstation.

Because all distant signals carried by cable systems were covered by the compulsory copyright license, there had never been a need to focus on the mode of their delivery. When Congress took up the definition of a superstation as it affected satellite carriers, conveyance by satellite was crucial to the activities of such entities, as well as to the particular copyright problem being addressed. Therefore, such definition naturally included the concept of a station's conveyance by satellite. The use of this exceedingly narrow definition of a superstation was

While the Commission is not being asked to alter the plain language of the statute in order to provide for a broader and more appropriate definition of a superstation, it has the power to provide the relief sought by Yankee. Where the language of an Act is clearly contrary to the intent of Congress, and Congress has arguably left room for interpretation, the Commission has on occasion applied a statute in a manner contrary to the apparent language of the Act.[9] For example, the Commission has already announced that, with respect to system tiering, a superstation would receive consistent treatment regardless of the particular delivery method employed by an individual cable operator.[10]

Specifically, Section 623(b)(7)(A)(iii) of the Act, consistent with its "superstation exemption" contained in Section

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[9] See e.g. Tariff Filing Requirements for Interstate Common Carriers, Report and Order in cc Docket No. 92-13, 7 FCC Rcd 8072, 8074 - 8077 & n. 54 (1992). Despite specific language contained in 47 U.S.C. § 203 requiring all common carriers to file tariffs, the Commission has consistently maintained that its policy of permissive detariffing, or forbearance, with respect to nondominant common carriers better advances the purposes of the Communications Act. Despite a recent ruling to the contrary by the U.S. Court of Appeals for the District of Columbia Circuit (AT&T v FCC, 978 F.2d 727 (1992)), and denial of certiorari by the U.S. Supreme Court, the Commission, in a just concluded rulemaking, continues to maintain that the affirmative language "shall" does not facially preclude permissive detariffing, and that the Commission as the expert agency in the field of communications has been given ample discretion to regulate in the public interest. 7 FCC Rcd at 8075 - 8076 & n.54.

[10] See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report And Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, at n. 416, released May 3, 1993.

325(b)(1)(D), excepts from carriage on the basic tier broadcast signals "secondarily transmitted by a satellite carrier beyond the local service area of such station." Nonetheless, the Commission has stated that "a superstation does not become a local broadcast station simply because a cable system receives it by microwave. It would frustrate Congressional intent to require a cable operator to carry superstations on the basic tier simply because that operator actually receives the signals by microwave." Id. If this logic holds true in the tiering context, it must therefore be equally true in the context of retransmission consent. If a broadcast station remains a "superstation" regardless of the method which a particular system uses to receive it, it would be illogical not to provide that operator with a "superstation exemption" for that very same signal because of the particular method of delivery.[11]

It is possible for the Commission to provide consistent

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[11] While the Commission must provide a consistent definition, and a consistent treatment for superstations within its Rules, it must do so by interpreting the superstation exemption in a manner consistent with its handling of tiering, and not vice versa. In Section 325(b)(3)(A) of the Act Congress specifically cautioned the FCC that in establishing regulations regarding retransmission consent and the limitations contained in paragraph (2) (which include the superstation exemption), the Commission shall consider the impact that retransmission consent may have on basic rates. Congress warned the Commission that such regulations should not conflict with its obligation to ensure reasonable basic rates. Clearly, requiring systems that obtain superstations via microwave to place such signals on the basic tier would discriminatorilly affect the cost of basic service for some systems, and would therefore run contrary to the explicit wishes of Congress.

treatment to superstations regardless of the mode of their delivery, while giving effect to the intent of Congress to promote competition and prevent otherwise unnecessary rate increases, and at the same time adhere to the apparent directive contained within the language of the statute. In interpreting the plain language of the Act, the Commission may plausibly read the statute to state that as long as a signal was a superstation on May 1, 1991, and was available by satellite at that time (as would be consistent with the Act's adopted definition of a superstation), then cable operators are entitled to the "superstation exemption" for that signal, regardless of whether they actually receive the signal via microwave. Thus, the Commission is free to modify its rules in the manner requested by Yankee in its Petition as supplemented.

Conclusion

For the reasons set forth herein and in Yankee's Petition For Reconsideration and subsequent supplements, the language of the "superstation exemption" rule must be stayed and the language modified to permit microwave carriers to continue to compete on an equal footing with satellite for the delivery of low cost superstation feeds to cable systems.

Respectfully submitted,

YANKEE MICROWAVE, INC.

By: _____
John D. Pellegrin

By: _____
Evan D. Carb

Its Attorneys

Law Offices of
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Suite 606
Washington, D.C. 20036
(202) 293-3831

Date: July 30, 1993

EXHIBIT 1

STATE CABLE TV

July 22, 1993

BY FACSIMILE

Mr. Bernard E. Karlen
President
Yankee Microwave, Inc.
31 Ward Drive
New Rochelle, NY 10804

Dear Bernie:

As discussed on the telephone this morning, the new FCC regulations relating to broadcast carriage requirements and the advancement of the effective date of rate regulation to September 1, 1993, has forced our Company to accelerate our decision-making process and take action to adequately inform and protect our customers. Therefore, I am notifying you of the proposed changes in the services that Yankee Microwave currently provides to our Company. The following outlines the individual systems and their current services and proposed adjustments.

A. The following outlines our current services:

- o Augusta System - Channel 9(CKSH) & Channel 38(WSBK)
- o Rumford System - Channel 9(CKSH) & Channel 38(WSBK) & Ch 56(WLVI)
- o Norway System - Channel 38(WSBK) & Channel 56(WLVI)
- o Livermore Falls System - Channel 38(WSBK) & Channel 56(WLVI)
- o Conway System - Channel 38(WSBK) & Channel 51(WPXT)
- o Littleton System - Channel 38(WSBK) & Ch. 56(WLVI) & Ch. 25(WPXT)

B. The following outlines the new services:

- o Augusta System - Channel 9(CKSH)
- o Rumford System - Channel 9(CKSH)
- o Conway System - Channel 51(WPXT)
- o Littleton System - Channel 51(WPXT)

We are currently planning to make the changes effective for Channel 56(WLVI) and the swap of Channel 25(WPXT) for Channel 51(WPXT) as of September 1, 1993. We anticipate the change for Channel 38(WSBK) to be effective as of October 1, 1993.

261 STATE STREET • AUGUSTA, MAINE 04330-6995

TEL 207-623-5148 • FAX 207-623-3407

I would appreciate it you would inform your technical and billing staff of the above service adjustments. I certainly recognize the difficulty and confusion these changes create, however, given the new regulatory environment, I am feel they are necessary.

If you have any questions, please call me (207) 623-3685.

Yours sincerely,

Michael J. Angelakis
President

cc: R. Clark Jr.
P. Drapeau
K. Hounsell
D. Maheu

EXHIBIT 2

YANKEE MICROWAVE, INC.

July 26, 1993

Senator George J. Mitchell
United States Senate
Washington, D.C. 20510-1902

Dear Senator Mitchell:

I dislike appealing to you during this trying time in your

Because of its popularity, the systems cannot drop the channel but using the satellite feed increases their cost thus defeating the stated purpose of reducing subscriber charges.

Federal law history is replete with "grandfathering". If ever there was an instance where this should apply, here it is. We have petitioned the FCC which does not see the need to move expeditiously. If the FCC does decide to correct the

CERTIFICATE OF SERVICE

I, Kathy Nagl, a secretary in the law firm of John D. Pellegrin, Chartered do hereby certify that I have on this 30th day of July, 1993 transmitted a copy of the attached "Additional Supplement to Petition for Emergency Reconsideration and Request for Modification of Rules of Yankee Microwave, Inc." by hand to the following:

The Honorable James H Quello,
Acting Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, DC 20554

The Honorable Andrew C. Barrett,
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, DC 20554

The Honorable Ervin S. Duggan,
Commissioner
Federal Communications Commission
1919 M Street, N.W.
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William H. Johnson,
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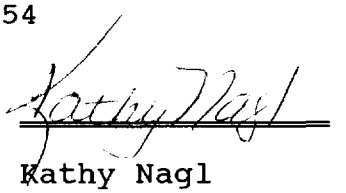

Kathy Nagl